

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

CASE NO.: 1:18-cv03364-LLS

THE MUSEUM OF MODERN ART,

Plaintiff,

v.

MOMACHA IP LLC and MOMACHA OP  
LLC,

Defendants.

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**DECLARATION OF ERIC CAHAN IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

I, ERIC CAHAN, under penalty of perjury, and pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am over the age of twenty-one, otherwise *sui juris*, and an authorized representative of the defendants, MOMACHA IP LLC and MOMACHA OP LLC (collectively, "MOMACHA"). I make this declaration in opposition to plaintiff's motion for a preliminary injunction based on personal knowledge and, if called as a witness, could and would testify competently to the facts stated herein.

2. The name "MOMACHA" is a registered trademark.

3. Before registering the name "MOMACHA" as a trademark, MOMACHA retained an attorney who conducted a trademark search to ensure that the name "MOMACHA" did not conflict with any other registered trademark.

4. MOMACHA was advised by counsel that the name "MOMACHA" did not pose

any issue whatsoever with any of the trademark rights of the MoMA, and MOMACHA relied on this advice in continuing to use the name “MOMACHA” in its business.

5. MOMACHA is a café that prepares and sells beverages, primarily matcha, which is a type of tea produced in Asia.

6. MOMACHA is derived from the words “More” and “Matcha,” not from the “MoMA” mark, as explained to and by the media outlet *Page Six* on or about April 9, 2018:

The unique name [MOMACHA] came from [Nev] Schulman and [Laura] Perlongo’s 1-year-old daughter, Cleo, we’re told.

“Laura had been spearheading the initiative right around the same time Cleo started talking,” Schulman said. “Every time she wanted more of a snack she would yell ‘Mo! Mo!’ and tap her hands together. So yeah... Mo Matcha!”

**Exhibit A** (ellipses in original).

7. While MOMACHA permits its customers to purchase the artwork that adorns its café, it is not a museum and does not provide any museum services, and each and every member of MOMACHA’s staff has been trained to explain to MOMACHA’s customers that MOMACHA has no affiliation with plaintiff THE MUSEUM OF MODERN ART (the “MoMA”) or any other museum.

8. MOMACHA also refrains from selling any products sold by the MoMA or any categories of products sold by the MoMA with the exception of artwork.

9. As to artwork, MOMACHA only sells original artworks created and prepared by local artists to be sold as primary works, whereas the MoMA only sells editioned prints and other reproductions of original artworks exhibited in the MoMA.

10. Although MOMACHA is not aware of any instances in which MOMACHA and the MoMA were confused, after the MoMA sued MOMACHA for, among other things,

trademark infringement, MOMACHA made substantial efforts and incurred substantial expenses to ensure that there is absolutely no confusion as to the source of MOMACHA's services.

11. These efforts include the following:

- a. On or about April 24, 2018, MOMACHA created two new logos, which appear as follows:

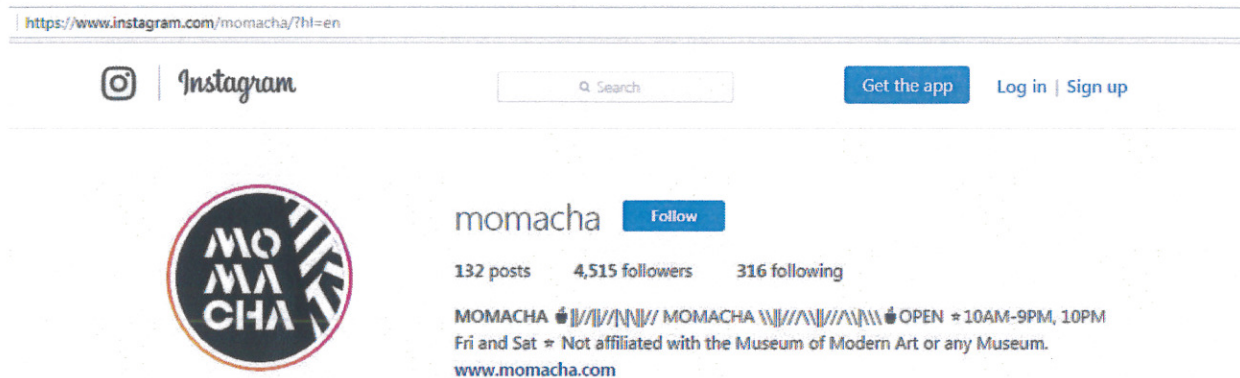


- b. On or about April 27, 2018, MOMACHA ordered new shirts, hats, and bags for its employees bearing the new MOMACHA logo in a different typeface. The shirts appear as follows:



- c. On or about April 28, 2018, MOMACHA changed its logo on its Instagram account, so as to appear as follows:



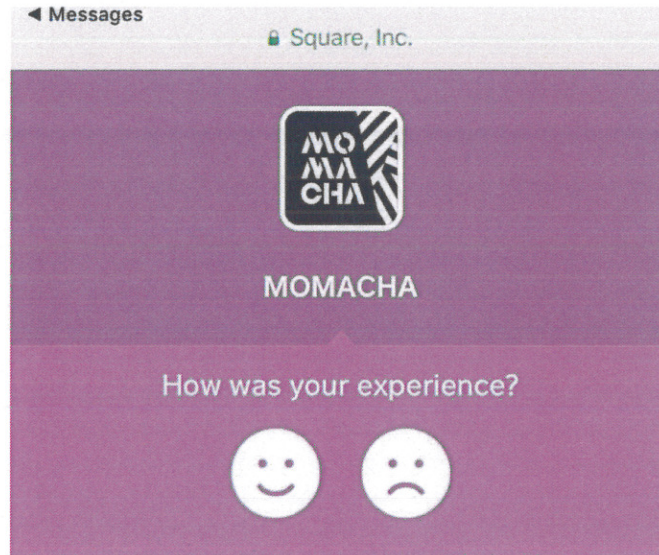


- d. On or about April 30, 2018, MOMACHA put the foregoing message on its Instagram account notifying the public that it has no affiliation with the MoMA (i.e., **“Not affiliated with the Museum of Art or any Museum.”**).
- e. On or amount May 1, 2018, MOMACHA changed its website to reflect its new logo and disclaim any affiliation with the MoMA. MOMACHA’s website now appears as follows:



- f. On or about May 2, 2018, MOMACHA ordered a new logo for the door to its café.

- g. On or about May 2, 2018, MOMACHA changed its Instagram and Facebook accounts to remove art from its categories, such that it is only included within the restaurant category.
- h. On or about May 7, 2018, MOMACHA changed its logo on its point-of-sale receipts, so as to appear as follows:



**\$7.53**

Pink Coconut Soft Serve	\$5.00
Pink Love	\$7.00
+ Oatly	
Employee Food Item	-\$6.00
Purchase Subtotal	\$6.00
NY Tax (8.875%)	\$0.53
Tip	\$1.00
Total	<b>\$7.53</b>

- i. On or about May 7, 2018, MOMACHA changed the font on its menus so as not to be confused with any form of the Gothic font used by the MoMA. Now, the font used on MOMACHA's menus appears as follows:

## MATCHA

### Shot

Uji Sourced Matcha + Filtered Water

### Regular

Uji Sourced Matcha + Filtered Water

### Latte

Uji Sourced Matcha + Macadamia Milk

### CBD Matcha Latte

Uji Sourced Matcha, CBD, Vanilla, Maple Syrup, Hemp Milk

### Enlightenment

Rotating selection of the highest Ceremonial Grade Matcha  
Ask your Tea Master for today's offering

## LATTES *Hot or Iced*

### Blue Majik

Lemon, Honey, Coconut Milk, E-3 Live Blue Majik  
(Natural Phycocyanin Extract)

### Turmeric Ginger

Turmeric, Ginger, Cardamom, Black Pepper,  
Cinnamon, Macadamia Milk

### Pink Love

Beet root, Raspberry, Vanilla, Orgeat, Oat milk,  
Scented by Victarine

### Charcoal Sesame

Activated Black Coconut Charcoal, Sesame,  
Maple Syrup, Vanilla, Almond Milk

### Beauty Potion

Rose Water, Honey, Schizandra Berry, Beetroot,  
Anima Mundi Collagen (He Shou Wu extract powder,  
Horseail extract powder, Gynostemma, Nettles,  
Calendula, Comfrey), Oat Milk

## MATCHA TONICS

**\$4 Mint Lemonade** **\$7**

Lemonade, Fresh Mint, Matcha, Sparkling Water

**\$5 Rose Petal** **\$7**

Cold-Pressed Rose, Matcha, Sparkling Water

**\$7 Lavender Sage** **\$7**

Cold-Pressed Lavender, Fresh Sage, Matcha,  
Sparkling Water

**Turmeric Thyme** **\$7**

Ginger, Turmeric, Fresh thyme, Lemon, Honey,  
Matcha, Sparkling water

## SOFT SERVE

**Matcha or Pink Coconut** **\$5**

**Cone+** **\$1**

## COLD BREW

**\$7 Cold Brew** **\$5**

Italian Espresso Roast Blend steeped for 24 hours  
and served over ice

**\$7**

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**ADD CBD to any drink** **\$4**

**\$7**

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**ADD Matcha Shot to any drink** **\$2**

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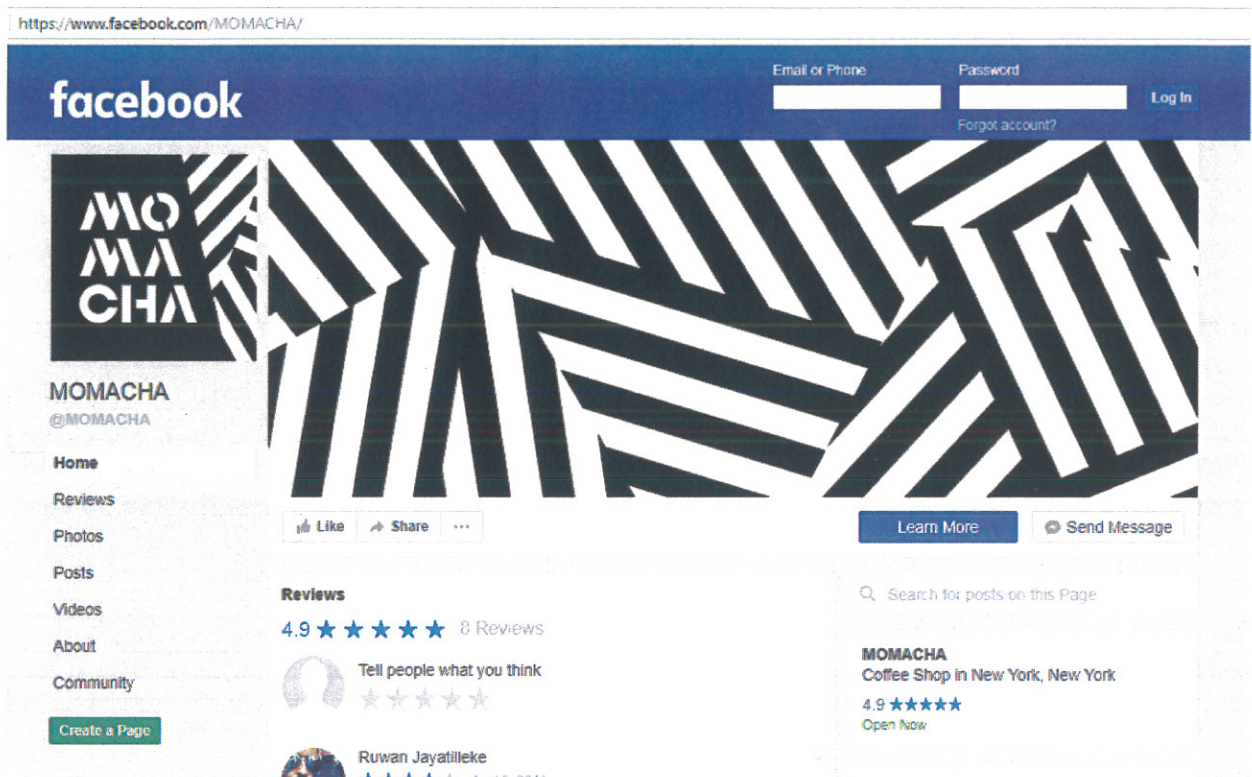
### What is Anima Mundi and E-3 Live Blue Majik?

**Anima Mundi Collagen** is an extraordinary mix of herbs that naturally boost collagen in the skin and body. The formula is a mix of adaptogens, ancient herbs and flowers known to support and beautify, repair and restore. This blend is an excellent plant-based solution to those that want to strengthen their bones, nails, hair, tissue and skin with 100% herbs.

**E-3 Live Blue Majik** is a proprietary, chemical free extract of *Arthrospira platensis* (Spirulina), a Nutrient Dense AquaBotanical™. Blue Majik is derived from the highest quality, organic raw material.

- j. On or about May 9, 2018, MOMACHA changed its logo on Facebook, so as to appear as follows:





- k. On or about May 9, 2018, MOMACHA changed its hashtag from “#MoMaCha” to “#MOMACHA.”
- l. On or about May 9, 2018, MOMACHA ordered new cups with its new logo, which are expected to arrive in or around July 9, 2018.
- m. On or about May 9, 2018, MOMACHA added a message to the bottom of its point-of-sale receipts disclaiming any affiliation with the MoMA. The bottoms of MOMACHA’s point-of-sale receipts now appear as follows:



AID: A0000000031010

Signature Verified

Return Policy: Unfortunately, there are no refunds or exchanges for consumed food and beverage items.

Thanks for visiting! We look forward to seeing you again soon.

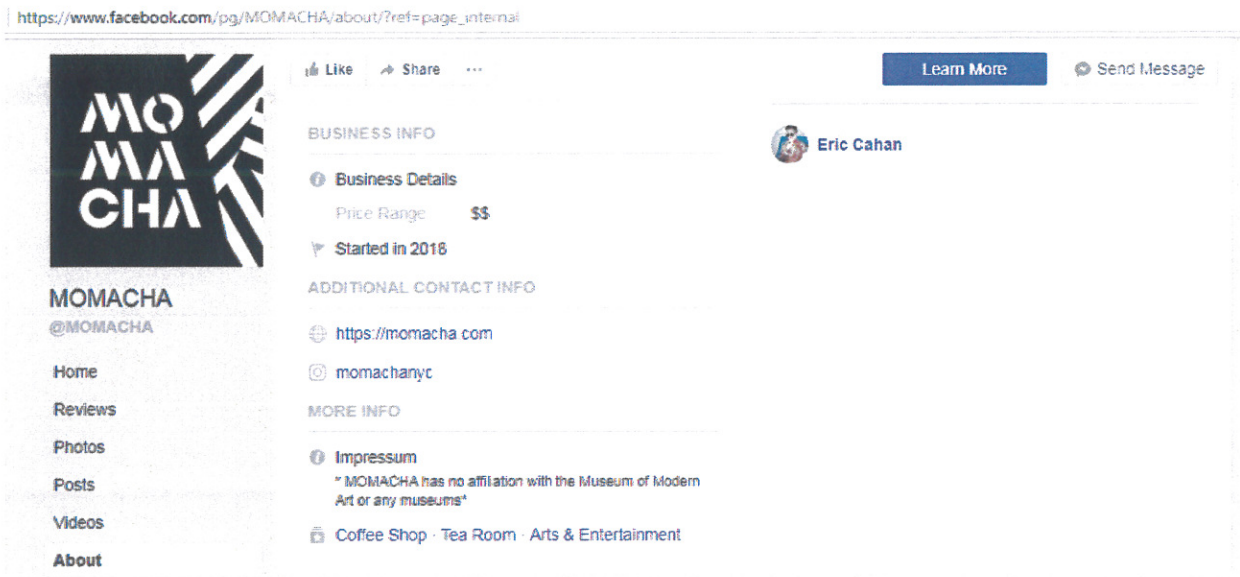
MOMACHA has no affiliation with the Museum of Modern Art or any museums

© 2018 Square, Inc.

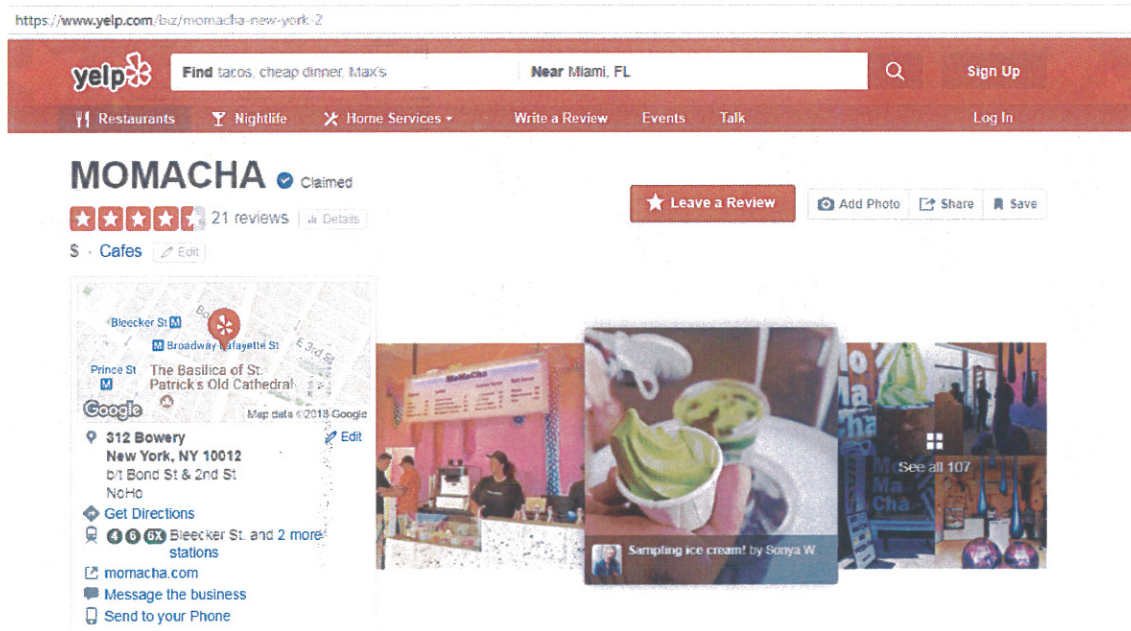
- n. On or about May 9, 2018, MOMACHA changed its signature blocks to reflect its new logo.
- o. On or about May 9, 2018, MOMACHA removed the pink logo exhibited in the MoMA's memorandum in support of its motion for preliminary injunction from its Pinterest account.<sup>1</sup>
- p. On or about May 9, 2018, MOMACHA put a message on its Facebook page disclaiming any affiliation with the MoMA, which appears as follows:

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<sup>1</sup> MOMACHA has not been able to identify any other location where the pink logo exhibited in the MoMA's memorandum in support of its motion for preliminary injunction appears.

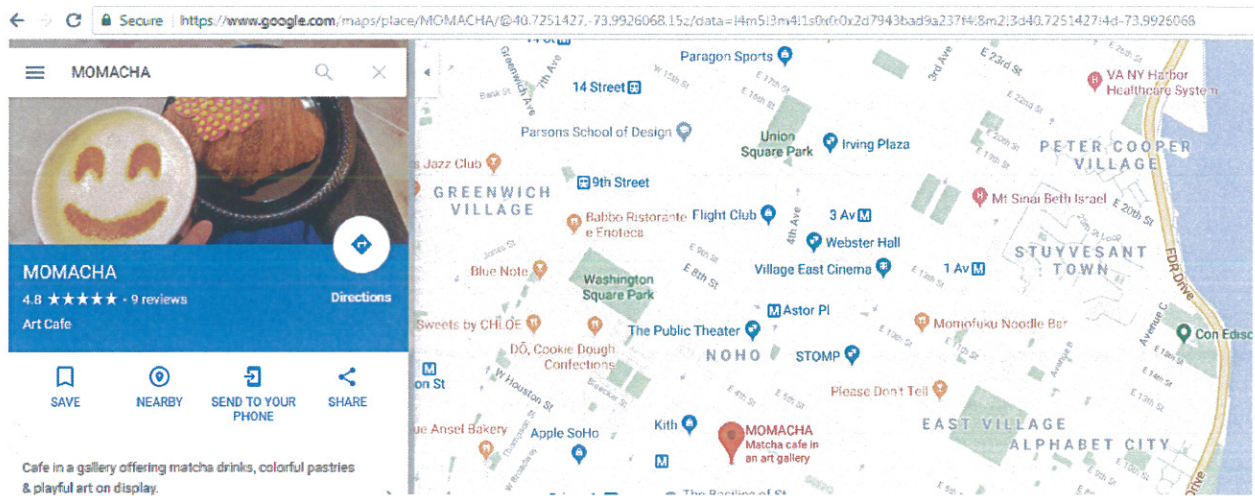


- q. On or about May 10, 2018, MOMACHA changed its name from “MoMaCha” to “MOMACHA” on Yelp. MOMACHA’s Yelp page now appears as follows:

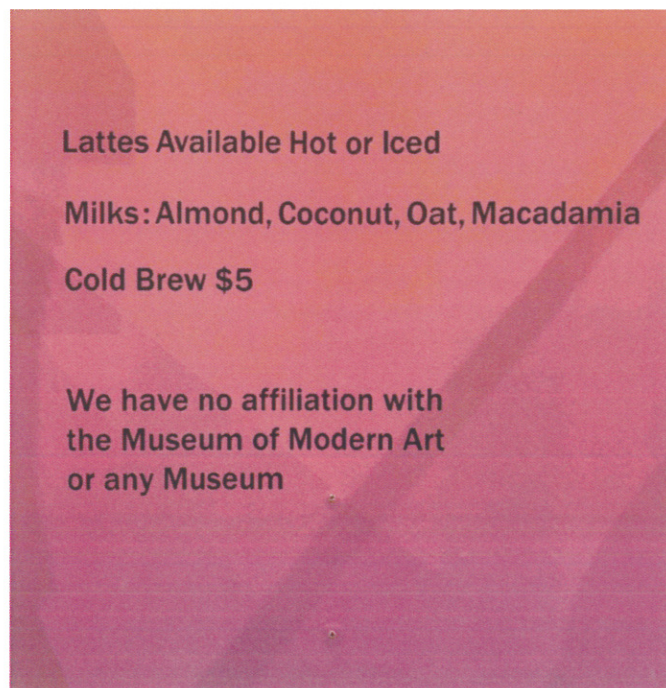


- r. On or about May 10, 2018, MOMACHA changed the written version of its name on its signature blocks from “MoMaCha” to “MOMACHA.”
- s. On or about May 10, 2018, MOMACHA changed its name from

“MoMaCha” to “MOMACHA” on Google Maps, so as to appear as follows:



- t. On or about May 10, 2018, MOMACHA changed its Instagram location from “MoMaCha” to “MOMACHA.”
- u. On or about May 10, 2018, MOMACHA put up the following sign in its café stating that MOMACHA has no affiliation with the MoMA or any other museum:





- v. On or about May 11, 2018, MOMACHA changed the door to its café so as to include a message disclaiming any affiliation with the MoMA:



- w. On or about May 11, 2018, MOMACHA changed the logo on the door to its café, so as to appear as follows:



12. MOMACHA does not believe any of its customers ever entered its café with the intent to purchase artworks or beverages prepared by the MoMA or with the mistaken impression that the artworks or beverages they purchased were prepared by the MoMA.

13. MOMACHA did not develop or use its name or marks for the purpose of

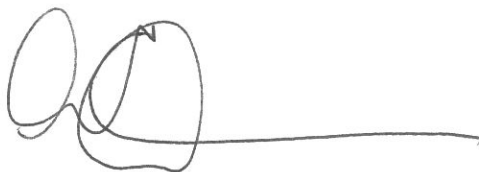


competing with the MoMA or profiting from any good will associated with the MoMA, its name, or its marks.

14. MOMACHA has not sought and does not intend to compete with the MoMA or profit from any good will associated with the MoMA, its name, or its marks.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on May 14, 2018, in New York, New York.

A handwritten signature in black ink, consisting of a stylized 'E' followed by a long horizontal line.

By:

Eric Cahan